UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/444/Add.4
2 March 1998

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirty-first session
New York, 1-12 June 1998

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

Addendum

Chapter III. SELECTION OF THE CONCESSIONAIRE

	Paragraph	Page
Legislative recommendations	-	3
Notes on legislative recommendations	1-99	8
Section		
A. General remarks	1-2	8
B. Selection procedures covered by the Guide	3-5	8
C. General objectives of selection procedures	6-14	9
1. Economy and efficiency	7-9	10
2. Promotion of integrity of and confidence in the selection process	10-11	10
3. Transparency of laws and procedures	12-14	11
D. Appropriate selection method	15-25	11
1. Range of proponents to be invited	19-20	12
2. Emphasis on output requirements	21-22	13

V.98-51372

	Paragraph	Page
3. Evaluation criteria	23-24	14
4. Negotiations with proponents	25	14
E. Preparations for selection proceedings	26-32	15
1. Appointment of the award committee	27	15
2. Feasibility and other studies	28-29	15
3. Preparation of documentation	30-32	15
F. Prequalification of project consortia	33	16
1. Invitation to prequalify	34-35	16
2. Prequalification criteria	36-38	17
3. Domestic preferences	39-40	18
4. Contribution towards costs of participation in selection proceedings	41-42	18
5. Prequalification proceedings	43-46	19
G. Procedures for requesting proposals	47-93	20
1. Phases of the procedure	47-49	20
2. Initial request for proposals	50-52	21
3. Final request for proposals	53-65	21
4. Content and submission of final proposals	66-69	24
5. Tender securities	70-71	25
6. Evaluation criteria	72-74	26
7. Opening, comparison and evaluation of proposals	75-77	27
8. Final negotiations	78-79	27
9. Notice of project award	80	28
H. Direct negotiations	81-93	28
1. Circumstances authorizing the use of direct negotiations	85-86	30
2. Unsolicited proposals	87-93	30
I. Review procedures	94	32
J. Record of selection proceedings	95-99	32

LEGISLATIVE RECOMMENDATIONS

Appropriate selection method

(1) For the selection of the concessionaire it is advisable to devise a method that promotes competition within structured, formal procedures. Direct negotiations should be reserved for exceptional circumstances (see paras. 15-18).

Prequalification of project consortia

(2) It is advisable to use a prequalification procedure to narrow down the number of proposals with which the awarding authority must deal. Proceedings involving the evaluation of more than a limited number of proposals are generally not suitable for privately financed infrastructure projects (see paras. 19-20).

(3) Where consortia are formed to submit proposals, their members should not be allowed to participate, directly or through subsidiary companies, in more than one consortium (see para. 38).

(4) Where preferences for national candidates or candidates who offer to procure supplies, services and products in the local market are envisaged, they should be applied as a margin of preference at the evaluation phase and announced in the invitation to prequalify (see paras. 39-40).

(5) It may be useful to allow the awarding authority to consider arrangements for compensating prequalified proponents if the project cannot proceed for reasons outside their control or for contributing to the costs incurred by them (see paras. 41-42).

(6) No criterion, requirement or procedure with respect to the qualifications of project consortia should be used that has not been set forth in the prequalification documents (see para. 44).

(7) Upon completion of the prequalification phase, the awarding authority should elaborate a short list of the prequalified project consortia which will be subsequently invited to submit proposals. Subsequent changes in the composition of prequalified consortia should require the approval of the awarding authority (see paras. 45-46).

Initial request for proposals

(8) Unless the awarding authority deems it feasible to formulate input or output specifications of the project and contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated, it is advisable to structure the proceedings for requesting proposals from qualified proponents in two stages (see paras. 47-49).

(9) The awarding authority should be allowed to convene a meeting of proponents to clarify questions concerning the request for proposals and to engage in negotiations with any proponent concerning any aspect of its proposal (see para. 51).

(10) Following those negotiations, the awarding authority should review and, as appropriate, revise the initial input or output specifications. The awarding authority should be allowed to delete or modify any aspect, originally set forth in the initial request for proposals, of the technical or quality characteristics of the project and any criterion originally set forth in those documents for evaluating and comparing proposals and for ascertaining the successful proponent (see para. 52).

Final request for proposals

(11) At the final stage, the awarding authority should invite the proponents to submit final proposals with price with respect to the revised specifications and contractual terms (see paras. 53-65).

Contents and submission of final proposals

(12) Technical proposals should, as a minimum, include:

(a) specifications and schedule of works;

(b) feasibility and other studies;

(c) description of services to be provided and applicable quality standards;

(d) description of maintenance services and standards (see para. 66).

(13) Financial proposals should, as a minimum, include:

(a) The proposed tariff or price structure;

(b) The proposed duration of the concession, where it is not specified in the request for proposals;

(c) The level of governmental financial support required for the project, including, as appropriate, any subsidy or payment expected from the host Government;

(d) The extent of risks assumed by the concessionaire during the construction and operation phases, including unforeseen events, insurance, equity investment and other guarantees against those risks (see para. 67).

Evaluation criteria

(14) Criteria for the evaluation of the non-price technical aspects of proposals should include technical feasibility; environmental effectiveness; effectiveness of the proposed construction and operation systems; soundness of the proposed financial arrangements, including resources of the proponents (see para. 72).

(15) Criteria for the evaluation of the price proposals should include costs for design and construction activities; annual operation; maintenance costs; present value of capital costs and operating costs; present value of the proposed price over the concession period; the amount of subsidy, if any, expected from the host Government (see para. 73).

Opening, comparison and evaluation of proposals

(16) Upon receipt of the final proposals, the awarding authority should ascertain whether they are *prima facie* responsive to the request for proposals. Incomplete or partial proposals should be rejected at this stage (see para. 75-77).

Final negotiations

(17) The awarding authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite for final negotiation of the project agreement the proponent that has attained the best rating. These negotiations should not concern those terms of the contract that were deemed not negotiable in the final request for proposals (see para. 78).

(18) If it becomes apparent to the awarding authority that the negotiations with the proponent invited will not result in a project agreement, the awarding authority should inform that proponent that it is terminating the negotiations and then invite for negotiations the other proponents on the basis of their ranking until it arrives at a project agreement or rejects all remaining proposals (see para. 79).

Notice of project award

(19) The awarding authority should cause a notice of the award of the project to be published. The notice should indicate:

(a) The name of the concessionaire;

(b) A list of the annexes and enclosures that form part of the agreement;

(c) A description of the works and services to be performed by the concessionaire;

(d) The duration of the concession;

(e) The tariff structure;

(f) The rights and obligations of the concessionaire and the guarantees assumed or to be provided by it;

(g) The monitoring rights of the awarding authority and remedies for breach of the project agreement;

(h) The obligations of the host Government, including any payment, subsidy or compensation offered by the host Government;

(i) Any other essential term of the project agreement, as provided in the request for proposals (see para. 80).

Circumstances authorizing the use of direct negotiations

(20) Direct negotiations should be resorted to only in exceptional circumstances (see paras. 82-85). Exceptional circumstances may include the following:

(a) When there is an urgent need for ensuring immediate provision of the service, and engaging in a selection procedure would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the awarding authority nor the result of dilatory conduct on its part;

(b) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount (see para. 86).

(21) Direct negotiations might be further resorted to when an invitation to prequalify or a request for proposals has been issued but no applications to prequalify or proposals were submitted, or all proposals were rejected by the awarding authority, and when, in the judgement of the awarding authority, issuing a new request for proposals would be unlikely to result in a project award (see para. 87).

Unsolicited proposals

(22) The awarding authority should establish transparent procedures for dealing with unsolicited proposals (see paras. 88-90).

(23) Upon receipt of an unsolicited proposal, the awarding authority should determine whether it might be in the public interest to develop the proposed project. The awarding authority should examine the proposal within a reasonable period. Title to all documentation submitted should vest in the proponent throughout the procedure. If the proposal is rejected, all documents submitted should be returned to the proponent. No proposals should be solicited concerning a rejected project for a minimum number of years without the invitation of the company which submitted the original proposal (see paras. 91-92).

(24) If the host Government accepts the proposal, the awarding authority should engage in a competitive selection procedure (such as request for proposals), preceded by a prequalification phase. The company that submitted the original proposal should be invited to participate in such proceedings and might be given, as a premium for submitting the proposal, a margin of preference over the final rating. If such a margin of preference is given, appropriate notice should be given to all companies invited to submit proposals (see para. 93).

Record of selection proceedings

(25) The law should require that the awarding authority keep appropriate record of key information pertaining to the selection proceedings (see paras. 94-99).

NOTES ON LEGISLATIVE RECOMMENDATIONS

A. General remarks

1. This chapter deals with methods and procedures recommended to be used for the award of privately financed infrastructure projects. In line with the advice of international organizations, such as the World Bank 1/ and UNIDO 2/, the *Guide* expresses a clear preference for the use of competitive selection procedures, rather than direct negotiations with project consortia, as further explained in paragraphs 15 to 17 below.

2. The selection procedures recommended in this chapter present some of the features of the tendering method under the UNCITRAL Model Law on Procurement of Goods, Construction and Services 3/ with a number of adaptations so as to take into account the particular needs of privately financed infrastructure projects. The method herein consists of a two stage procedure with a prequalification phase. It allows some scope for negotiations between the awarding authority and the proponents within clearly defined conditions. The description of the procedures recommended for the selection of the concessionaire is primarily concerned with those elements that are special to, or particularly relevant for, privately financed infrastructure projects. Where appropriate, this chapter refers the reader to provisions of the UNCITRAL Model Law, which may *mutatis mutandis* supplement the selection procedure described herein.

B. Selection procedures covered by the *Guide*

3. Private investment in infrastructure may take various forms, each requiring special methods for selecting the concessionaire. For the purpose of discussing possible selection methods for the infrastructure projects dealt with in the *Guide*, a distinction may be made between three main forms of private investment in infrastructure:

(a) *Purchase of public utilities enterprises*. Private capital may be invested in public infrastructure through the purchase of physical assets or the shares of public utility enterprises. Those transactions are often carried out in accordance with rules governing the award of contracts for the disposition of State property. Disposition methods often include

---

1/ International Bank for Reconstruction and Development, *Procurement under IBRD and IDA Loans*, 1996, para. 3.13(a).

2/ *UNIDO BOT Guidelines*, p. 96.

3/ The UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereafter referred to as "the UNCITRAL Model Law") and its accompanying Guide to Enactment, were adopted by the Commission at its twenty-seventh session (New York, 31 May-17 June 1994).

competitive proceedings such as auctions or invitations to bid whereby the property is awarded to the qualified party offering the highest price;

(b) *Provision of public services without development of infrastructure*. In other types of projects, the service providers own and operate all the equipment necessary and sometimes compete with other suppliers for the provision of the relevant service. Some national laws establish special procedures whereby the State may authorize a private entity to supply public services by means of exclusive or non-exclusive "licences". Licences may be publicly offered to interested parties who satisfy the qualification requirements set forth by the law or established by the licensing authority. Sometimes licensing procedures involve public auctions to interested qualified parties;

(c) *Construction and operation of public infrastructure*. In projects for the construction and operation of public infrastructure, a private entity is engaged to provide both works and services to the public. The procedures governing the award of those contracts are in many aspects similar to those that govern public procurement of construction and services. National laws provide a variety of methods for public procurement, ranging from structured competitive methods, such as tendering proceedings, to less structured negotiations with prospective suppliers.

4. This chapter deals primarily with selection procedures suitable to be used for infrastructure projects which involve an obligation, on the part of the selected private entity, to undertake physical construction, repair, or expansion works in the infrastructure concerned with a view to subsequent private operation (i.e. those referred to in paragraph 3(c) above). It does not deal specifically with methods for disposal of State property for privatization purposes or procedures for licensing public service providers.

5. It should be noted, however, that some infrastructure projects may involve elements of more than one of the categories mentioned above, a circumstance which the Government may wish to consider when choosing the selection method. For instance, the acquisition of a privatized public utility (e.g. a water distribution company) may be coupled with an obligation to effect substantial investment in new infrastructure (e.g. expansion of pipe network). In those situations, it is important for the Government to identify the predominant element of the project (e.g. whether privatization or construction of new infrastructure) in order to choose the appropriate selection procedure which the Government might then wish to adjust so as to take into account the main ancillary obligations expected to be assumed by the concessionaire. To that end, some of the considerations set forth in this chapter may also be relevant, *mutatis mutandis*, for the disposal of State property or licensing procedures which involve an obligation on the part of the new concessionaire or licensee to undertake infrastructure works.

C. General objectives of selection procedures

6. For the award of contracts for infrastructure projects, the host Government may either apply methods and procedures already provided in its laws or establish procedures specifically designed for that purpose. In either situation, it is important to ensure that such procedures are

generally conducive to attaining the fundamental objectives of rules governing the award of public contracts. Those objectives are briefly discussed below.

1. Economy and efficiency

7. In connection with infrastructure projects, economy refers to the selection of a concessionaire that is capable of performing works and delivering services of the desired quality at the most advantageous price and upon the most advantageous contractual terms. It is promoted by procedures that provide a favourable climate for participation in the selection process by competent companies and that provide incentives to them to offer their most advantageous terms.

8. In most cases, economy is best achieved by means of procedures that promote competition among project consortia. Competition provides them with incentives to offer their most advantageous terms, and it can encourage them to adopt efficient or innovative technologies or production methods in order to do so. Furthermore, economy can often be promoted through participation by foreign companies in selection proceedings. Not only can foreign participation expand the competitive base, it can also lead to the acquisition by the awarding authority and its country of technologies that are not available locally. Foreign participation in selection proceedings may be necessary where there exists no domestic expertise of the type required by the awarding authority. A country desiring to achieve the benefits of foreign participation should ensure that the relevant laws and procedures are conducive to such participation. It should be noted, however, that competition does not necessarily require the participation of a large number of proponents in a given selection process. Particularly for large projects, there may be reasons for the awarding authority to wish to limit the number of participants to a manageable number (see paras. 19-20). Provided that appropriate procedures are in place, the awarding authority can take advantage of effective competition even where the competitive base is limited.

9. Efficiency refers to selection of a concessionaire within a reasonable amount of time, with minimal administrative burdens and at reasonable cost both to the awarding authority and to participating contractors or suppliers. In addition to the losses that can accrue directly to the awarding authority from inefficient selection procedures (e.g. due to delayed selection or high administrative costs), excessively costly and burdensome procedures can lead to increases in the overall project costs or even discourage competent companies from participating altogether in the selection proceedings.

2. Promotion of integrity of, and confidence in, the selection process

10. Another important objective of rules governing the selection of the concessionaire is to promote the integrity of, and confidence in, the process. Thus, an adequate selection system will usually contain provisions designed to ensure fair treatment of project consortia, to reduce or discourage unintentional or intentional abuses of the selection process by persons administering it or by companies participating in it, and to ensure that selection decisions are taken on a proper basis.

11. Promoting the integrity of the selection process will help to promote public confidence in the process and in the public sector in general. Project consortia will often refrain from spending the time and sometimes substantial sums of money to participate in selection proceedings unless they are confident that they will be treated fairly and that their proposals or offers have a reasonable chance of being accepted. Those that do participate in selection proceedings in which they do not have that confidence have a tendency to increase the project cost to cover the higher risks and costs of participation. Ensuring that selection proceedings are run on a proper basis could reduce or eliminate that tendency and result in more favourable terms to the awarding authority.

3. Transparency of laws and procedures

12. Transparency of laws and procedures governing the selection of the concessionaire will help to achieve various of the policy objectives already mentioned. Transparent laws are those in which the rules and procedures to be followed by the awarding authority and by project consortia are fully disclosed, particularly to such participants. Transparent procedures are those which enable the participants to ascertain what procedures have been followed by the awarding authority and the basis of decisions taken by it.

13. One of the most important ways to promote transparency and accountability is to include provisions requiring that the awarding authority maintain a record of the selection proceedings (see paras. 95-99). A record summarizing key information concerning those proceedings facilitates the exercise of the right of aggrieved project consortia to seek review. That in turn will help to ensure that the rules governing the selection proceedings are, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of awarding authorities to the public at large as regards the award of infrastructure projects. A general requirement of record-keeping in procurement proceedings is contained in article 11 of the UNCITRAL Model Law.

14. Transparent laws and procedures create predictability, enabling project consortia to calculate the costs and risks of their participation in selection proceedings and thus to offer their most advantageous terms. They also help to guard against arbitrary or improper actions or decisions by the awarding authority or its officials and thus help to promote confidence in the process. Transparency of laws and procedures is of particular importance where foreign participation is sought, since foreign companies may be unfamiliar with the country's practices for the award of infrastructure projects.

D. Appropriate selection method

15. Generally, economy and efficiency in the award of public contracts are best achieved through methods that promote competition among a range of contractors and suppliers within structured, formal procedures. Competitive selection procedures, such as tendering, are usually prescribed by national laws as the rule for normal circumstances in procurement of goods or construction.

16. In competitive selection procedures, the awarding authority typically invites a range of companies to submit proposals which must be formulated on the basis of technical specifications and contractual terms specified by the awarding authority in the documents made available by it to proponents. Proposals are examined, evaluated and compared and the decision of which proposal to accept is made in accordance with essentially objective criteria and procedures that are set forth in the procurement laws and in the tender documents. Competitive selection procedures are said to be "open" when the awarding authority solicits proposals by means of a widely advertised invitation to tender directed to all companies wishing to participate in the proceedings. The procedures are said to be "restricted" when the awarding authority solicits proposals only from certain companies selected by it.

17. The formal procedures and the objectivity and predictability that characterize the competitive selection procedures generally provide optimal conditions for competition, transparency and efficiency. Thus, the rules for procurement under loans provided by the World Bank require that, for projects financed with loans provided by the World Bank, the concessionaire has to be selected pursuant to competitive procedures acceptable to the World Bank (e.g. "international competitive bidding"). 4/ The use of competitive selection procedures in privately financed infrastructure projects has also been recommended by UNIDO, which has formulated detailed practical guidance on how to structure those procedures. 5/ However, no international legislative model has thus far been specifically devised for competitive selection procedures in privately financed infrastructure projects.

18. National legislative provisions on competitive procedures for the procurement of goods construction or services may not be entirely suitable for privately financed infrastructure projects. International experience in the award of privately financed infrastructure projects has revealed some limitations of traditional forms of competitive selection procedures, such as the tendering method. In the light of the particular issues raised by privately financed infrastructure projects, which are briefly discussed below, it is advisable for the host Government to consider adapting such procedures for the selection of the concessionaire.

1. Range of proponents to be invited

19. In traditional Government procurement, the objective of economy is often maximized by allowing for as wide as possible competition among contractors and suppliers. Invitations to tender are sometimes issued directly without prior prequalification proceedings. Where

---

4/ Under the World Bank Rules, a concessionaire selected pursuant to procedures acceptable to the World Bank is generally free to adopt its own procedures for the award of contracts required to implement the project. However, where the concessionaire was not itself selected pursuant to those competitive procedures, the award of subcontracts has to be done pursuant to competitive procedures acceptable to the World Bank (International Bank for Reconstruction and Development, *Procurement under IBRD and IDA Loans*, 1996, para. 3.13(a)).

5/ *UNIDO BOT Guidelines*, p. 96.

prequalification is required, it is sometimes limited to verifying a number of formal requirements (e.g. the contractors' professional qualification or legal capacity).

20. The award of privately financed infrastructure projects, in turn, typically involves complex, time-consuming and expensive proceedings. Furthermore, the sheer scale of most infrastructure projects reduces the likelihood of obtaining proposals from a large number of suitably qualified project consortia. In addition, competent project consortia may be reluctant to participate in procurement proceedings for high-value projects if the competitive field is too large and where they run the risk of having to compete with unrealistic proposals or proposals submitted by unqualified candidates. Therefore, open tendering without a prequalification phase is usually not advisable for the award of infrastructure projects.

2. Emphasis on output requirements

21. In traditional public procurement of construction works the Government usually assumes the position of a *maître d'ouvrage* or employer, while the selected contractor carries out the function of the performer of the works. The procurement procedures applied by the Government emphasize the inputs to be provided by the contractor, i. e. the awarding authority establishes clearly what is to be built, how and by what means. It is therefore common that invitations to tender for construction works are accompanied by extensive and very detailed specifications of the type of works and services being procured. In those cases, the Government will be responsible for ensuring that the specifications are adequate to the type of infrastructure to be built and that such infrastructure will be capable of being operated efficiently. In some privately financed infrastructure projects, particularly those involving works of moderate complexity or where the infrastructure is owned by the Government or is to be ultimately transferred to it, the Government usually wishes to establish precise specifications for the works to be performed or the technical means for the services to be provided (i. e. the "input" expected from the concessionaire).

22. However, for many privately financed infrastructure projects, the host Government may envisage a different allocation of responsibilities between the public and the private sector. One of the underlying reasons for some Governments to promote private sector participation in infrastructure development is to release themselves from the immediate responsibility for those functions that are capable of being efficiently carried out by the private sector. Instead of assuming the direct responsibility for managing the project, those Governments may prefer to transfer such responsibility to the concessionaire. In those cases, after having established a particular infrastructure need, the Government may prefer to leave to the private sector the responsibility for devising the best solution for meeting such a need. The selection procedure used by the host Government may thus give more emphasis to the output expected from the project (i.e. the services or goods to be provided) rather than to technical details of the works to be performed or means to be used to provide those services. While the host Government remains ultimately accountable to the public for the quality of the works and services, the private sector will bear the risks that might result, for instance, from the inadequacy of the technical solutions used (see paras. 47-49).

3. Evaluation criteria

23. Goods, construction works or services are typically purchased by Governments with funds available under approved budgetary allocations. With the funding sources usually secured, the main objective of the procuring entity is to obtain the best value for the funds it spends. Therefore, in those types of procurement the decisive factor in establishing the winner among the responsive and technically acceptable proposals is often the global price offered for the construction works, which is calculated on the basis of the cost of the works and other costs incurred by the contractor plus a certain margin of profit.

24. Privately financed infrastructure projects, in turn, are typically expected to be financially self-sustainable, in that the development and operational costs are to be recovered from the project's own revenue. This circumstance, compounded with the magnitude of most infrastructure projects, renders the task of evaluating proposals considerably more complex than in more traditional forms of procurement. Therefore, a number of other factors will need to be considered in addition to the construction and operation cost and the price to be paid by the users. For instance, the awarding authority will need to consider carefully the financial and commercial feasibility of the project, the soundness of the financial arrangements proposed by the project consortia and the reliability of the technical solutions used. Such interest exists even where no governmental guarantees or payments are involved, because unfinished projects or projects with large cost over-runs or higher than expected maintenance costs often have a negative impact on the overall availability of needed services and on the public opinion in the host country. Furthermore, given the usually long duration of infrastructure concessions, the awarding authority will need to satisfy itself of the soundness and acceptability of the arrangements proposed for the operational phase and will weigh carefully the service elements of the proposals (see paras. 72-74).

4. Negotiations with proponents

25. Laws and regulations governing tendering proceedings often prohibit negotiations between the awarding authority and the contractors concerning a proposal submitted by them. The rationale for such a strict prohibition, which is also contained in article 35 of the UNCITRAL Model Law, is that negotiations might result in an "auction", in which a proposal offered by one contractor is used to apply pressure on another contractor to offer a lower price or an otherwise more favourable proposal. As a result of that strict prohibition, contractors selected to provide goods or services pursuant to traditional procurement procedures are typically required to sign standard contract documents provided to them during the procurement proceedings. However, given the complexity of infrastructure projects, it is unlikely that the parties could agree on the terms of a draft project agreement without negotiation and adjustments to adapt those terms to the particular needs of the project. Therefore, it may be useful to allow for some negotiation between the awarding authority and the selected project consortium (see paras. 78-79).

E. Preparations for selection proceedings

26. The award of privately financed infrastructure projects is in most cases a complex exercise requiring careful planning and coordination among the offices involved. By ensuring that adequate administrative and personnel support is available to conduct the type of selection proceeding that it has chosen, the host Government plays an essential role in promoting confidence in the selection process.

1. Appointment of the award committee

27. One important preparatory measure is the appointment of the committee that will be responsible for evaluating the proposals and making an award recommendation to the awarding authority. The appointment of qualified and impartial members to the selection committee is not only a requirement for an efficient evaluation of the proposals, but may further foster the confidence of project consortia in the selection process.

2. Feasibility and other studies

28. As already indicated (see "Introduction and background information on privately financed infrastructure projects", para. 94), one of the initial steps taken by the host Government in respect of a proposed infrastructure project is to conduct a preliminary assessment of its feasibility, including economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility. The option to develop infrastructure as a privately financed project requires a positive conclusion of the feasibility and financial viability of the project.

29. Prior to starting the proceedings leading to the selection of a prospective concessionaire, it is advisable for the awarding authority to review and, as required, expand those initial studies. In some countries awarding authorities are advised to formulate model projects for reference purposes (typically including a combination of estimated capital investment, operation and maintenance costs) prior to inviting proposals from the private sector. The purpose of such model projects is to demonstrate the viability the commercial operation of the infrastructure and the affordability of the project in terms of total investment cost and cost to the public. They will also provide the awarding authority with a useful tool for comparison and evaluation of proposals. Confidence of project consortia will be promoted by evidence that the technical, economical and financial assumptions of the project, as well as the proposed role of the private sector, have been carefully considered by the host Government.

3. Preparation of documentation

30. Selection proceedings for the award of privately financed infrastructure projects typically require the preparation of extensive documentation by the awarding authority, including project outline, prequalification documents, the request for proposals, instructions for preparing proposals and a draft of the project agreement. The quality and clarity of the

documents distributed by the awarding authority plays a significant role in ensuring an efficient and transparent selection procedure. The awarding authority may need, at this early stage, to retain the services of independent experts or advisors to assist in establishing appropriate qualification and evaluation criteria, defining output specifications (and, if necessary, input specifications) and preparing the documentation to be issued to project consortia.

31. In many countries it is customary for the Government to devise standard contract forms and general conditions of contract that are used in public contracting. In some countries there may be fairly detailed standard contracts for different infrastructure sectors. Where standard contract documents are provided to project consortia during the selection proceedings, the awarding authority may have limited discretion to negotiate the terms of the project agreement with the selected group of project consortia. Standard contract terms may be useful to help expedite the conclusion of the project agreement by limiting the matters on which the parties have to elaborate contractual provisions. They may further be useful for ensuring consistency in the treatment of issues common to most projects in a given sector.

32. However, in using standard contract terms it is advisable to bear in mind the possibility that a specific project may raise issues that had not been anticipated when the standard document was prepared or that the project may necessitate particular solutions that might be at variance with the standard terms. Careful consideration should be given to the need for achieving the appropriate balance between the level of uniformity desired for project agreements of a particular type and the flexibility that might be needed for finding project-specific solutions.

F. Prequalification of project consortia

33. In most privately financed infrastructure projects the host Government may wish to narrow down the number of proposals with which the awarding authority must deal. This result may be achieved by applying a rigorous procedure to limit the number of prospective proponents from whom proposals will be subsequently requested. In addition, prequalification proceedings for privately financed infrastructure projects may involve elements of evaluation and selection, particularly where the awarding authority establishes a ranking of prequalified project consortia. Thus the prequalification of project consortia differs from more traditional prequalification proceedings, such as those used in the procurement of goods or services, where all candidates that meet the prequalification criteria are automatically admitted to the tendering phase.

1. Invitation to prequalify

34. In order to promote transparency and competition, it is advisable that the invitation to prequalify be published in a manner that reaches an audience wide enough to provide an effective level of competition. The laws of many countries identify publications, usually the official gazette or other official publication, in which the invitation to prequalify is to be published. In view of the objective of the UNCITRAL Model Law of fostering participation in procurement proceedings without regard to nationality and maximizing competition, article 24(2) requires publication of the invitations to prequalify also in a language customarily used

in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

35. Prequalification documents should contain sufficient information for project consortia to be able to ascertain whether the works and services entailed by the project are of a type that they can provide and, if so, how they can participate in the selection proceedings. In addition to elements that are usually required to be contained in prequalification documents under general rules on public procurement (e.g. those mentioned in articles 7(3)(i), (iii), (iv) and (v); 25(1)(a) and (d); and 25(2)(a)-(d) of the UNCITRAL Model Law), the invitation to prequalify should identify the infrastructure to be built or renovated and contain information on other essential elements of the project, including the services to be delivered by the concessionaire, the financial arrangements envisaged by the awarding authority (e.g. whether the project will be entirely financed by user fees or tolls or whether public funds may be provided as direct payments, loans or guarantees) and, where already known, a summary of the principal required terms of the project agreement to be entered into as a result of the selection proceedings.

2. Prequalification criteria

36. Generally, project consortia should be required to demonstrate that they possess the professional and technical qualifications, financial and human resources, equipment and other physical facilities, managerial capability, reliability and experience, as necessary to carry out the project (cf. UNCITRAL Model Law, article 6(1)(b)(i)). Qualification requirements should cover all phases of an infrastructure project, including financing management, engineering, construction, operation and maintenance, where appropriate.

37. It is advisable to avoid burdening the law with details concerning qualification requirements and to leave it instead to regulations or to the awarding authority to set forth the type of information to be provided by the project consortia, including, for instance, quality indicators of their past performance as public service providers or infrastructure operators. Such information may relate to the size and type of previous projects carried out by the project consortia; the level of experience of the key personnel to be engaged in the project; sufficient organizational capability, including minimum levels of construction, operation and maintenance equipment. The regulations may set forth in some detail the manner in which the project consortia have to demonstrate their capability to sustain the financing requirements for the engineering, construction and operational phases of the project. The awarding authority may at this stage establish a minimum percentage of equity investment and require that the project consortia indicate the envisaged financing arrangements.

38. Given the large scale of most infrastructure projects, the interested companies typically participate in the selection proceedings through consortia especially formed for that purpose. Therefore, information required from consortium members should relate to the consortium as a whole as well as to its individual participants. For the purpose of facilitating the liaison with the awarding authority, it may be useful to require in the prequalification documents that each consortium should designate one of its members as a focal point for all communications with the awarding authority. It is further advisable for the awarding authority to review carefully

the composition of consortia and their parent companies. It may happen that one company, directly or through subsidiary companies, joins more than one consortium to submit proposals for the same project. Such a situation should not be allowed, since it raises the risk of leakage of information or collusion between competing consortia, thus undermining the credibility of the selection proceedings. It is therefore advisable to provide in the invitation to prequalify that the same company, directly or through subsidiary companies, may not be a member of more than one consortium in the same selection proceedings. A violation of this rule should cause the disqualification of the consortia concerned.

3. Domestic preferences

39. The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to candidates that undertake to use national goods or employ local labour. Such preferential or special treatment is sometimes provided as a material qualification requirement (e.g. a minimum percentage of national participation in the consortium) or as a condition for participating in the selection procedure (e.g. to appoint a local partner as a leader of the project consortium).

40. Where such preferences are established, it is important to weigh the expected advantages against the disadvantage of depriving the awarding authority of the possibility of obtaining better options to meet the national infrastructure needs. It is further important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. This is the reason why many countries that wish to provide some incentive to national suppliers, while at the same time taking advantage of international competition, do not contemplate a blanket exclusion of foreign participation or restrictive qualification requirements. Domestic preferences may take the form of special evaluation criteria establishing margins of preference for national candidates or candidates who offer to procure supplies, services and products in the local market. The margin of preference technique, which is provided in article 34(4)(d) of the UNCITRAL Model Law, is more transparent than subjective qualification or evaluation criteria. Furthermore, it allows the awarding authority to favour local project consortia that are capable of approaching internationally competitive standards and prices, and it does so without simply excluding foreign competition. Where domestic preferences are envisaged, it is advisable that they be announced in advance, preferably in the invitation to prequalify.

4. Contribution towards costs of participation in selection proceedings

41. In some countries, a high price may be charged for the prequalification documents, while in other countries that price might reflect only the cost of printing the prequalification documents and providing them to the candidates. Expensive prequalification documents may be used as an additional tool to limit the number of candidates. At the same time, however, they add to the already considerable cost of participation in the selection proceedings. The high costs of preparing proposals for infrastructure projects and the relatively high risks that a selection procedure may not lead to a contract award may function as a deterrent for some companies to join in a consortium to submit a proposal, particularly when they are not familiar with the selection procedures applied in the host country.

42. Therefore, some countries authorize the awarding authority to consider arrangements for compensating prequalified proponents if the project cannot proceed for reasons outside their control or for contributing to the costs incurred by them after the prequalification phase, when justified in a particular case by the complexity involved and the prospect of significantly improving the quality of the competition. It is advisable that such contribution or compensation, when authorized, be announced at an early stage, preferably in the invitation to prequalify.

5. Prequalification proceedings

43. The awarding authority should respond to any request by a project consortium for clarification of the prequalification documents that is received by the awarding authority within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the awarding authority should be given within a reasonable time so as to enable the project consortia to make a timely submission of their application to prequalify. The response to any request that might reasonably be expected to be of interest to other project consortia should, without identifying the source of the request, be communicated to all project consortia to which the awarding authority provided the prequalification documents (cf. UNCITRAL Model Law, article 7(4)).

44. Qualification requirements should apply equally to all project consortia. An awarding authority should not impose any criterion, requirement or procedure with respect to the qualifications of project consortia which has not been set forth in the prequalification documents (cf. UNCITRAL Model Law, article 6(3)). When considering the professional and technical qualifications of project consortia, the awarding authority should consider the individual specialization of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

45. In some countries, awarding authorities are encouraged to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (e.g. three or four). For that purpose, those countries apply a quantitative rating system for technical, managerial and financial criteria, taking into account the nature the project. Where such a rating system is to be used, that circumstance should be clearly stated in the prequalification documents.

46. Upon completion of the prequalification phase, the awarding authority usually elaborates a short list of the prequalified project consortia which will be subsequently invited to submit proposals. One practical problem sometimes faced by awarding authorities concerns proposals for changes in the composition of project consortia during the selection proceedings. From the perspective of the awarding authority, it is generally advisable to exercise caution in respect of proposed substitutions of individual members of project consortia after the closing of the prequalification phase. Changes in the composition of consortia may substantially alter the basis on which the prequalified project consortia were short-listed by the awarding authority and may give rise to questions about the integrity of the selection proceedings. As a general

rule, only prequalified project consortia should be allowed to participate in the selection phase, unless the awarding authority can satisfy itself that a new consortium member meets the prequalification criteria to substantially the same extent as the retiring member of the consortium.

G. Procedures for requesting proposals

1. Phases of the procedure

47. Following the prequalification of project consortia, it is advisable for the awarding authority to review its original feasibility study and the definition of the output and performance requirements and consider whether a revision of those requirements is needed in the light of the information obtained during the prequalification proceedings. At this stage, the awarding authority should have already determined whether the project consortia will be asked to formulate proposals on the basis of input or output specifications and whether alternatives to those specifications will be considered. If it is deemed both feasible and desirable for the awarding authority to formulate specifications (whether based on expected input or output) to the necessary degree of precision or finality, the Government may wish to structure the selection process as a single-stage selection procedure and proceed to issue a final request for proposals (see paras. 53-79).

48. However, in some cases it may not be feasible for the awarding authority to formulate its requirement in terms of sufficiently detailed and precise specifications or contractual terms to permit proposals to be formulated, evaluated and compared uniformly on the basis of those specifications and terms. This may be the case, for instance, when the awarding authority has not determined the type of technical and material input that would be suitable for the project in question (e.g. the type of construction material to be used in a bridge) or the exact manner in which to meet a particular need, and therefore is seeking proposals as to various possible solutions to obtain the expected output (e.g. the type of payment and traffic control system for a toll road).

49. In such cases, it might be considered undesirable, from the standpoint of obtaining the best value, for the awarding authority to proceed on the basis of specifications it has drawn up in the absence of discussions and negotiations with project consortia as to the exact capabilities and possible variations of what is being offered. For that purpose, the host Government may wish to divide the selection proceedings into two stages and allow a certain degree of flexibility for discussions and negotiations with project consortia. The first stage of those proceedings should provide an opportunity for the awarding authority to solicit various proposals relating to the technical, quality or other characteristics of the project as well as to the contractual terms. Upon the conclusion of that first stage, the awarding authority should finalize the specifications and, on the basis of those specifications, in the second stage, request final proposals from the project consortia.

2. Initial request for proposals

50. Where the selection procedure is divided in two phases, the initial request for proposals typically calls upon the project consortia to submit proposals relating to broad output specifications and other characteristics of the project as well as to contractual terms.

51. The awarding authority may then convene a meeting of proponents to clarify questions concerning the request for proposals and accompanying documentation. The awarding authority may, in the first stage, engage in negotiations with any proponent concerning any aspect of its proposal. The awarding authority should treat proposals in such a manner as to avoid the disclosure of their contents to competing consortia. Any negotiations need to be confidential, and one party to the negotiations should not reveal to any other person any technical, financial or other information relating to the negotiations without the consent of the other party.

52. Following those negotiations, the awarding authority should review and, as appropriate, revise the initial output specifications. In formulating those revised specifications, the awarding authority should be allowed to delete or modify any aspect of the technical or quality characteristics of the project originally set forth in the request for proposals, and any criterion originally set forth in those documents for evaluating and comparing proposals. Any such deletion, modification or addition should be communicated to project consortia in the invitation to submit final proposals. Project consortia not wishing to submit a final proposal should be allowed to withdraw from the selection proceedings without forfeiting any tender security that they may have been required to provide.

3. Final request for proposals

53. At the final stage, the awarding authority should invite the proponents to submit final proposals with respect to the revised specifications and contractual terms.

(a) Content of request for proposals

54. It might be desirable for the legislative or regulatory texts governing the selection proceedings to contain a listing of the information required to be included in the request for proposals. An indication in those laws or regulations of those requirements is useful to ensure that the request for proposals include the information necessary to provide a basis for enabling the project consortia to submit proposals that meet the needs of the awarding authority and that the awarding authority can compare in an objective and fair manner. Listings of items to be included in the solicitation documents for the procurement of goods and construction and in the request for proposals for services are contained, respectively, in articles 27 and 38 of the UNCITRAL Model Law.

55. One category of items to be contained in the request for proposals concerns instructions for preparing and submitting proposals (cf. UNCITRAL Model Law, article 27(a)). The purpose of including these provisions is to limit the possibility that qualified project consortia would be placed at a disadvantage or even rejected due to lack of clarity as to how the

proposals should be prepared. Instructions for preparing proposals usually cover, as appropriate, items such as the manner and the currency or currencies in which the proposal prices (i. e. the proposed schedule of tolls, fees, unit prices and other charges) are to be formulated and expressed (cf. UNCITRAL Model Law, articles 27(i) and (j) and 38(j) and (k)).

56. The request for proposals should describe the works and services to be performed, including, as appropriate, technical specifications, plans, drawings and designs; the location where the construction is to be effected and the services to be provided; time schedule for the execution of works and provision of services (cf. UNCITRAL Model Law, articles 27(d) and 38(g)). If alternative proposals, including variations to non-mandatory elements of the request for proposals, are admitted, the awarding authority should indicate the manner in which they would be compared and evaluated. Alternative proposals should be rejected if they are not accompanied by a fully responsive proposal.

57. The level of detail provided in the specifications, as well as the appropriate balance between the input and output elements, will be influenced by considerations of issues such as the type and ownership of the infrastructure and the allocation of responsibilities between the public and the private sectors. For the construction of new infrastructure to be permanently owned by the Government and destined to be generally open for public use (e.g. roads, tunnels, bridges), the Government may see a need to have a larger degree of control over the engineering design and technical specifications than in the case of privately-owned facilities generally closed to the public and accessible only to the concessionaire (e.g. a private power plant). It is generally advisable for the awarding authority to bear in mind the long-term needs of the project and to formulate its specifications in a manner that allows it to obtain sufficient information so as to select the project consortium that offer the highest quality of services at the best economic terms. In some countries, awarding authorities have been encouraged to formulate specifications for services in a way that define adequately the output and performance required without being over prescriptive in how that is to be achieved.

58. To the extent the terms of the contractual arrangements are already known by the awarding authority, they should be included in the request for proposals, possibly in the form of a draft of the project agreement. The availability of that information at the earliest possible stage facilitates the project consortia's task of establishing the financial viability of the project, in consultation with prospective lenders and capital providers. In order to establish clearly the scope of negotiations following the evaluation of proposals, the final request for proposals should indicate which are the terms of the project agreement that are deemed not negotiable. A requirement that the final proposals submitted by the project consortia should contain evidence showing the comfort of the project consortium's preferred lenders with the proposed commercial terms and allocation of risks, as outlined in the request for proposals, might play a useful role in resisting pressures to reopen commercial terms at the stage of final negotiations (see para. 78). In some countries, project consortia are required to initial and return to the awarding authority the draft project agreement together with their final proposals as a confirmation of their acceptance of all terms in respect of which they did not propose specific amendments.

59. In addition to the items listed above, a number of other items may be particularly relevant for infrastructure projects. For build-operate-transfer projects, for instance, it is advisable to include information regarding the assets and property to be transferred to the host Government at the end of the concession. Where the host Government is selecting a new concessionaire to operate an existing infrastructure, the request for proposals should also include a description of the assets and property that will be made available to the concessionaire. It is also desirable to indicate in the request for proposals the possible alternative, supplementary or ancillary revenue sources (e.g. concessions for exploitation of existing infrastructure), if any, that may be offered to the successful proponent.

60. Other important items of the request for proposals concern in particular the manner in which the proposals will be evaluated; their disclosure is required to achieve transparency and fairness in the selection proceedings. Particularly important is the disclosure of the criteria to be used by the awarding authority in determining the successful proposal, including any margin of preference and any criteria other than price to be used, and the relative weight of such criteria (cf. UNCITRAL Model Law, articles 27(b) and 38(m)).

61. Further relevant information concerns the manner, place and deadline for the submission of proposals (cf. UNCITRAL Model Law, articles 27(n) and 38(c)); the means by which project consortia may seek clarifications of the request for proposals, and a statement as to whether the awarding authority intends, at this stage, to convene a meeting of project consortia (cf. UNCITRAL Model Law, articles 27(o) and 38(q)); the period of time during which proposals shall be in effect (cf. UNCITRAL Model Law, articles 27(o)); the place, date and time for the opening of proposals; and the procedures to be followed for opening and examining proposals (cf. UNCITRAL Model Law, article 27(q) and (r)).

62. One important aspect to be considered by the awarding authority relates to the relationship between the award of one particular project and the governmental policy pursued for the sector concerned (see chapter II, "Sector structure and regulation"). Where competition is sought, the host Government may be interested in ensuring that the relevant market or sector is not dominated by one enterprise (e.g. that the same company does not operate more than a certain limited number of local telephone companies within a given territory). The host Government may thus wish to retain the possibility of rejecting a particular proposal if it determines that the award of the project to the consortium submitting the proposal might make it possible for a particular company to dominate the relevant market or otherwise distort the competition in the sector concerned. For purposes of transparency, it is desirable for the law to provide that, where the awarding authority reserves the right to reject a proposal on those or similar grounds, adequate notice of that circumstance must be included in the request for proposals.

63. Where the awarding authority further reserves the right to reject all proposals, without incurring liability towards proponents, such as compensation for their costs of preparing and submitting proposals, a statement to that effect should be included in the request for proposals (cf. UNCITRAL Model Law, articles 27(x) and 38(d)).

(b) Clarifications and modifications

64. It is desirable to establish procedures for clarification and modification of the request for proposals in a manner that will foster efficient, fair and successful conduct of selection proceedings. The right of the awarding authority to modify the request for proposals is important in order to enable it to obtain what is required to meet its needs. It is also desirable to authorize the awarding authority, whether on its own initiative or as a result of a request for clarification by a project consortium, to modify the request for proposals by issuing an addendum at any time prior to the deadline for submission of proposals. However, in case of extensive amendments of the request for proposals, the deadline for submission of proposals may need to be extended.

65. Generally, clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated promptly by the awarding authority to all project consortia to whom the awarding authority provided the request for proposals (cf. UNCITRAL Model Law, article 28(1)). If the awarding authority convenes a meeting of project consortia, it should prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals, and its responses to those requests, without identifying the sources of the requests, and send copies to the project consortia.

4. Content and submission of final proposals

66. In view of the complexity of privately financed infrastructure projects and the variety of evaluation criteria usually applied in the award of the project, project consortia are often required to formulate and submit separately their technical and financial proposals. The technical proposals to be submitted by the project consortia should include: specifications and schedule of works; feasibility and other studies; description of services to be provided and applicable quality standards; description of maintenance services and standards.

67. Financial proposals should include: proposed tariff or price structure; proposed duration of the concession, where it is not specified in the request for proposals; level of governmental financial support required for the project, including, as appropriate, any subsidy or payment expected from the awarding authority; the extent of risks assumed by the project consortia during construction and operation phase, including unforeseen events, insurance, equity investment and other guarantees against those risks.

68. Feasibility studies are particularly important in privately financed infrastructure projects. They should substantiate the feasibility and viability of the project and should, for instance, cover the following aspects:

(a) *Commercial viability*: particularly in projects financed on a non-recourse or limited recourse basis, it is essential to establish the need for the project outputs and to evaluate and project such needs over the proposed operational life of the project, including expected demand (e.g. traffic forecasts for roads) and pricing (e.g. tolls);

(b) *Engineering design and operational feasibility*: project consortia should be requested to demonstrate the suitability of the technology they propose, including equipment and processes, to national, local and environmental conditions, the likelihood of achieving the planned performance level and the adequacy of the construction methods and schedules. This study should also define the proposed organization, methods and procedures for operating and maintaining the completed facility;

(c) *Financial viability*: project consortia should be requested to indicate the proposed sources of financing for the construction and operation phases, including debt capital and equity investment. While the loan and other financing agreements in most cases are not executed until after the signing of the project agreement, the project consortia should be required to submit sufficient evidence of the lenders' intention to extend the specified financing to the project company. This study should also indicate the expected financial internal rate of return in relation to the effective cost of capital corresponding to the financing arrangements proposed. Such information should allow the awarding authority to consider the reasonableness and affordability of the proposed fees or prices to be charged by the concessionaire and the potential for subsequent increases in the fees or prices;

(d) *Environmental impact*: this study should identify possible negative or adverse effects on the environment as a consequence of the project and indicate corrective measures that need to be taken.

69. In formal selection proceedings, proposals should be required to be submitted in writing, signed and in sealed envelopes. Proposals received by the awarding authority after the deadline for the submission of proposals should not be opened and should be returned to the project consortium that submitted it (cf. UNCITRAL Model Law, article 30(6)).

5. Tender securities

70. It may be advisable for the laws or regulations governing the selection process to authorize the awarding authority to require the project consortia to post a tender security so as to cover those losses that may result from withdrawal of proposals or failure by the selected project consortium to conclude a project agreement.

71. It is advisable that the request for proposals indicate any requirements of the awarding authority with respect to the issuer and the nature, form, amount and other principal terms of any tender security to be provided by project consortia submitting proposals (cf. UNCITRAL Model Law, art. 27(1)). In order to ensure a fair treatment of all project consortia, requirements that refer directly or indirectly to the conduct by the project consortium submitting the proposal should not relate to conduct other than: withdrawal or modification of the proposal after the deadline for submission of proposals, or before the deadline if so stipulated in the request for proposals; failure to achieve financial closing; failure to sign the project agreement if required by the awarding authority to do so; and failure to provide a required security for the performance of the contract after the proposal has been accepted or to comply with any other condition precedent to signing the project agreement specified in the request for proposals (cf. UNCITRAL Model Law, article 32(1)(f)(i)-(iii)). Safeguards should

be included to ensure that a tender-security requirement is only imposed fairly and for the intended purpose.6/

6. Evaluation criteria

72. Criteria for the evaluation of the non-price technical aspects of proposals should include technical feasibility; environmental effectiveness; effectiveness of the proposed construction and operation systems; soundness of the proposed financial arrangements, including resources of the proponents. The evaluation committee should rate the non-price elements of each proposal in accordance with the predisclosed rating systems for the non-price evaluation criteria and specify in writing the reasons for the rating. Besides criteria relating to the quality of the proposal, additional non-price criteria sometimes used by awarding authorities include the extent of participation by local suppliers and contractors, the economic development potential offered by the proposal, the encouragement of employment, the transfer of technology, the development of managerial, scientific and operational skills. For the purpose of ensuring objectivity and transparency, no weight should be given to prequalification criteria at the evaluation stage.

73. Criteria for the evaluation of the financial proposals should include costs for design and construction activities; annual operation and maintenance costs; present value of capital costs and operating costs; present value of the proposed price over the concession period; the amount of subsidy, if any, expected from the host Government. For the awarding authority it is advisable not to limit itself to a comparison of the unit prices offered for the expected output but to consider instead all elements of the financial proposals so as to assess their financial feasibility and the likelihood of subsequent increases in the proposed prices.

74. It is important for the awarding authority to determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals. To the extent practicable, the non-price criteria applied by the awarding authority should be objective and quantifiable, so as to enable proposals to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. Regulations governing the selection process might spell out how such factors are to be formulated and applied.

6/ Article 32 of the UNCITRAL Model Law provides certain important safeguards, including, *inter alia*, the requirement that the awarding authority should make no claim to the amount of the tender security, and should promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest: (a) the expiry of the tender security; (b) the entry into force of the project agreement and the provision of a security for the performance of the contract, if such a security is required by the request for proposals; (c) the termination of the selection process without the entry into force of a project agreement; or (d) the withdrawal of the proposal prior to the deadline for the submission of proposals, unless the request for proposals stipulates that no such withdrawal is permitted.

7. Opening, comparison and evaluation of proposals

75. For the purpose of ensuring transparency, national laws often prescribe formal procedures for the opening of proposals, usually at a time previously specified in the request for proposals, and require that the project consortia that have submitted proposals, or their representatives, be permitted by the awarding authority to be present at the opening of proposals (cf. UNCITRAL Model Law, article 33). Awarding authorities selecting project consortia for infrastructure projects may wish to structure the evaluation of proposals in two stages, as in the evaluation procedure provided in article 42 of the UNCITRAL Model Law. In an initial stage, the awarding authority typically establishes a threshold with respect to quality and technical aspects to be reflected in the technical proposals in accordance with the criteria other than price as set out in the proposals, and rates each technical proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals. The awarding authority then compares the financial proposals that have attained a rating at or above the threshold.

76. When the technical and financial proposals are to be evaluated consecutively, the awarding authority at this stage usually opens only the technical proposals and ascertains whether they are *prima facie* responsive to the request for proposals (e.g. whether they cover all items required to be addressed in the technical proposals). Incomplete or partial proposals should be rejected at this stage. While the awarding authority may ask project consortia for clarifications of their proposals, no change in a matter of substance in the proposal, including changes aimed at making an unresponsive proposal responsive, should be sought, offered or permitted at this stage (cf. UNCITRAL Model Law, article 34(1)(a)).

77. The most advantageous proposal should be the one with the highest combined rating in respect of both price and non-price evaluation criteria. Alternatively, the price proposed for the output (e.g. the water or electricity tariff, the level of tolls) might be the deciding factor for establishing the winning proposal among those that have passed the threshold with respect to quality and technical aspects. In order to promote the transparency of the selection process, and to avoid improper use of non-price evaluation criteria, it is advisable to require the awarding committee to provide a written justification of the reasons for selecting a proposal other than the offering the lowest unit price for the output.

[The Commission may wish to consider the desirability of elaborating further on the evaluation criteria recommended to be used to award privately financed infrastructure projects, particularly as regards the notion of "price" and other criteria used to evaluate financial proposals.]

8. Final negotiations

78. The awarding authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite for final negotiation of the project agreement the project consortium that has attained the best rating or, as appropriate, the one that offered the lowest price for the output among those that attained the minimum threshold in respect of technical aspects. One particular problem faced by awarding authorities

is the danger that the negotiations with the best qualified project consortium might lead to pressures to amend, to the detriment of the host Government, the price or risk allocation originally contained in the proposal. Changes in essential elements of the proposal should not be permitted, as they may distort the assumptions on the basis of which the proposals were submitted and rated. Therefore, the negotiations at this stage may not concern those terms of the contract that were deemed not negotiable in the final request for proposals.

79. The awarding authority should inform the remaining responsive project consortia that they may be considered for negotiation if the negotiations with the project consortium with better ratings do not result in a project agreement. If it becomes apparent to the awarding authority that the negotiations with the project consortium invited will not result in a project agreement, the awarding authority should inform that project consortium that it is terminating the negotiations and then invite for negotiations the next project consortium on the basis of its ranking until it arrives at a project agreement or rejects all remaining proposals. To avoid the possibility of abuse and unnecessary delay, the awarding entity should not reopen negotiations with any project consortium with whom they had already been terminated.

9. Notice of project award

80. Project agreements frequently include provisions that are of direct interest for parties other than the awarding authority and the project company, and who might have a legitimate interest in being informed about certain essential elements of the project. This is particularly the case for projects involving the provision of a service directly to the general public. For transparency purposes, it may be advisable to establish procedures for publicizing those terms of the project agreement that may be of public interest. One possible procedure may be to require the awarding authority to publish a notice of the award of the project, indicating, *inter alia*, the following elements: (a) the name of the project company;(b) the annexes and enclosures that form part of the agreement; (c) a description of the works and services to be performed by the project company; (d) the duration of the concession; (e) the tariff structure; (f) the rights and obligations of the project company and the guarantees to be provided by it; (g) the monitoring rights of the awarding authority and remedies for breach of the project agreement; (h) the obligations of the host Government, including any payment, subsidy or compensation offered by the host Government; and (i) any other essential term of the project agreement, as provided in the request for proposals. Where such a system is used, it is important to ensure consistency between the notice of award and the project agreement.

H. Direct negotiations

81. In some countries, concessions of public services have traditionally been regarded as a delegation of a State function and, as such, the delegating authority is not bound to follow the same procedures that govern the award of public contracts. In those countries, concessions may be awarded after direct negotiations between the delegating authority and a concessionaire of its choice. In contrast to the competitive selection procedures, which sometimes may appear to be excessively rigid, selection by negotiation is characterized by a high degree of flexibility as to the procedures involved and discretion on the part of the awarding authority.

Sometimes the only requirement for those negotiations may consist in the previous publication of a notice to interested parties who wish to be invited to those negotiations.

82. In other countries, where tendering is under normal circumstances the rule for the award of public contracts, awarding authorities have been encouraged to resort to direct negotiations whenever possible for the award of privately financed infrastructure projects. The rationale for encouraging negotiations in those countries is that in negotiating with project consortia the Government is not bound by pre-determined requirements or rigid specifications and has more flexibility for taking advantage of innovative or alternative proposals that may be submitted by the participants in the selection proceedings, as well as for changing and adjusting its own requirements in the event that more attractive options for meeting the infrastructure needs are formulated during the negotiations.

83. National laws that deal with selection by negotiation usually establish few rules and procedures governing the process by which the parties negotiate and conclude their contract. However, the laws in some countries provide for selection methods that combine certain basic features of the tendering and negotiation methods. In one of such structured methods of negotiation, which is sometimes referred to as "competitive negotiation", the awarding authority solicits proposals from a limited number of companies believed to have the appropriate qualifications and expertise. It also sets forth general criteria that proposals are requested to meet (e.g. general performance objectives, output specification). The awarding authority identifies the proposals that appear to meet those criteria and engages in discussions with the author of each such proposal in order to refine and improve upon the proposal to the point where it is satisfactory to the awarding authority. The price of each proposal does not enter into those discussions. When the proposals have been finalized, the awarding authority requests the author of each proposal to submit a firm price offer in respect of its proposal. The awarding authority selects the proposal of the company offering the lowest price or lowest evaluated price.

84. Negotiated methods generally afford a high degree of flexibility that some countries may find beneficial to the selection of the concessionaire. However, negotiated methods may have a number of disadvantages that make them less suitable to be used as a principal selection method in a number of countries. Because of the high level of flexibility and discretion afforded to the awarding authority, negotiated methods require highly skilled personnel with sufficient experience in negotiating complex projects. They also require a well structured negotiation team, clear lines of authority and a high level of coordination and cooperation among all the offices involved. Therefore, the use of negotiations for the award of privately financed infrastructure projects may not represent a viable alternative for countries that do not have the tradition of using such methods for the award of large Government contracts. Another disadvantage of negotiated methods is that they may not ensure the level of transparency and objectivity that can be achieved by more structured competitive methods. In some countries there might be concerns that the higher level of discretion in negotiated methods might carry with it a higher risk of abusive or corrupt practices.

1. Circumstances authorizing the use of direct negotiations

85. In countries that generally prescribe the use of the competitive selection procedures as a rule for the award of privately financed infrastructure projects direct negotiations are usually only authorized in exceptional cases. For transparency purposes as well as for ensuring discipline in the award of projects, it might be generally desirable for the law to identify the circumstances that may authorize the use of direct negotiations. They may include the following:

(a) When there is an urgent need for ensuring immediate provision of the service, and engaging in a competitive selection procedure would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the awarding authority nor the result of dilatory conduct on its part;

(b) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount.

86. In some countries, after a competitive selection procedure was initiated, situations might arise under which the awarding authority may prefer to change the selection method in favour of direct negotiations. This may be particularly the case when an invitation to prequalify or a request for proposals has been issued but no applications to prequalify or proposals were submitted, or all proposals were rejected by the awarding authority, and when, in the judgement of the awarding authority, issuing a new request for proposals would be unlikely to result in a project award. In such a case, the awarding authority might prefer to enter into negotiations with responsive proponents, as a an alternative to having to reject all proposals and start another procedure with possible uncertain results.

2. Unsolicited proposals

87. Unsolicited proposals may result from the identification by the private sector of a need that may be met by a privately financed infrastructure project. They may also involve innovative proposals for infrastructure management. The host Government may therefore have an interest in stimulating the private sector to formulate innovative proposals for infrastructure development. At the same time, however, the award of projects pursuant to unsolicited proposals and without competition from other project consortia may expose the Government to serious criticism, particularly in cases involving exclusive concessions. Furthermore, in the absence of competition the host Government may deprive itself of objective parameters for comparing prices, technical elements and the overall effectiveness of the project.

88. Two basic approaches may be found for dealing with such unsolicited proposals: in some countries the Government is authorized to negotiate unsolicited proposals directly with the proponent; in other countries projects resulting from unsolicited proposals, too, need to be awarded pursuant to the generally applicable award procedures.

89. One possibility for taking advantage of the potential innovation that may result from unsolicited proposals may be to establish a transparent procedure for dealing with such proposals, such as the procedure described in the following paragraphs.

(a) Submission of initial proposal

90. The company or project consortia who approach the host Government with a suggestion for private infrastructure development may be requested to submit an initial proposal containing the following information: description of the company or companies concerned (references to previous projects, financial information); the project (type of project, location, regional impact, proposed investment, operation costs, financial assessment, resources needed from the host Government or third parties); the site (ownership and whether land or other property will have to be expropriated); a description of the service and the works.

(b) Initial response and formal proposals

91. Following a preliminary examination, the host Government should inform the company, within a reasonably short period, whether or not there is a potential public interest in the project. When the host Government reacts positively to the project, the company should be invited to submit a formal proposal which, in addition to the items covered in the initial proposal, has to contain a technical and economical feasibility study (including characteristics, costs and benefits) and an environmental impact study. The company submitting the unsolicited proposal should retain title to all documents submitted throughout the procedure, and those documents should be returned to it in the event the proposal is rejected. In order not to discourage unsolicited proposals, it is advisable to provide that no proposals may be solicited concerning a rejected project for a certain number of years without the invitation of the company which submitted the original proposal.

(c) Public proposal

92. If the host Government accepts the proposal, the awarding authority should engage in public selection proceedings as described above in paragraphs 43-80, to which the company that submitted the original proposal should be invited. In such proceedings, the original proponent might be given, as a premium for submitting the proposal, a margin of preference over the final rating.

93. In the subsequent proceedings the awarding authority may need to make use of designs, plants and other documents that had been originally submitted with the unsolicited proposal. Thus, it is important to settle at this stage possible questions concerning the intellectual property rights in those designs, plants and documents, in the event that such intellectual property rights have not yet been acquired by the awarding authority. *[The Commission may wish to consider whether this issue should be elaborated further.]*

I. Review procedures

94. An important safeguard of proper adherence to the rules governing the selection procedure is that project consortia have the right to seek review of actions by the awarding authority in violation of those rules. Essential features of a review procedure may be drawn, *mutatis mutandis*, from chapter VI of the UNCITRAL Model Law.

J. Record of selection proceedings

95. In order to ensure transparency and accountability and to facilitate the exercise of the right of aggrieved project consortia to seek review of decisions made by the awarding authority, the law should require that the awarding authority keep an appropriate record of key information pertaining to the selection proceedings.

96. The record to be kept by the awarding authority should firstly contain, *mutatis mutandis*, such general information concerning the selection proceedings as is usually required to be recorded for public procurement (e.g. the information listed in article 11 of the UNCITRAL Model Law), including the following:

(a) A description of the project for which the awarding authority requested proposals;

(b) The names and addresses of the companies participating in project consortia that submitted proposals and the name and address of the members of the project consortium with whom the project agreement is entered into;

(c) Information relative to the qualifications, or lack thereof, of project consortia; a summary of the evaluation and comparison of proposals including the application of any margin of preference;

(d) The price, or the basis for determining the price, and a summary of the other principal terms of the proposals and of the project agreement;

(e) A summary of any requests for clarification of the prequalification documents or the request for proposals, the responses thereto, as well as a summary of any modification of those documents;

(f) If all proposals were rejected, a statement to that effect and the grounds therefor.

97. In addition to the above information, it may be useful to require the awarding authority to include the following information in the record of the selection proceedings:

(a) A summary of the conclusions of the preliminary feasibility studies commissioned by the awarding authority and a summary of the conclusions of the feasibility studies submitted by the qualified proponents;

(b) The list of the prequalified project consortia;

(c) If changes to the composition of the prequalified project consortia are subsequently permitted, a statement of the reasons for authorizing such changes and a finding as to the qualifications of the new members or members admitted to the consortia concerned;

(d) If the awarding authority finds most advantageous a proposal other than the proposal offering the lowest unit price for the expected output, a justification of the reasons for such finding by the awarding committee;

(e) If the negotiations with the consortium that submitted the most advantageous proposal and any subsequent negotiations with remaining responsive consortia did not result in a project agreement, a statement to that effect and of the grounds therefor.

98. For selection proceedings involving direct negotiations (see paras. 81-86) it may be useful to include the following information in the record of the selection proceedings:

(a) A statement of the grounds and circumstances on which the awarding authority relied to justify the direct negotiation;

(b) The name and address of the company or companies invited to those negotiations;

(c) If those negotiations did not result in a project agreement, a statement to that effect and of the grounds therefor.

99. For selections proceedings engaged in as a result of unsolicited proposals (see paras. 87-93) it may be useful to include, in addition to the information the following information in the record of the selection proceedings:

(a) The name and address of the company or companies submitting the unsolicited proposal and a brief description thereof;

(b) A certification by the awarding authority that the unsolicited proposal was found to be of public interest.

[The Commission may wish to consider the usefulness of including a discussion of what kind of information should be available to the public and what information should be reserved for the host Government and the proponents.]

* * *